STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2003
v	No. 235779 Saginaw Circuit Court
DAVID STEINER, Defendant-Appellant.	LC No. 00-018564-FH

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of distributing child sexually abusive material, MCL 750.145c(3), and thirteen counts of possession of child sexually abusive material, MCL 750. 145c(4). Defendant was sentenced to fifty-six to eighty-four months' imprisonment on his conviction of distributing child sexually abusive material and twelve-months' imprisonment on his thirteen misdemeanor convictions for possession of child sexually abusive material. Defendant appeals as of right. We affirm.

Defendant first challenges the sufficiency of the evidence sustaining his convictions arguing that he was not adequately identified as the person who sent or possessed the child sexually abusive material. We disagree.

Due process requires that the prosecution introduce sufficient evidence that would justify a rational factfinder in finding guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). When considering whether sufficient evidence was presented to sustain a conviction, the reviewing court must consider the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All evidentiary conflicts are resolved in favor of the prosecution. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

Defendant was convicted under MCL 750.145c(3) and (4), which states in relevant part:

> (3) A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00 or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child. . . .
>
> (4) A person who knowingly possesses any child sexually abusive material is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $10,000.00 or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child, or that person has not taken reasonable precautions to determine the age of the child. . . . [MCL 750.145c(3) and (4).]

The statute further defines child sexually abusive material as encompassing a "developed or undeveloped photograph, film, slide, electronic visual image, computer diskette, or sound recording of a child engaging in a listed sexual act." MCL 750.145c(1)(i). A "listed sexual act" is defined as "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(e).

Here, notwithstanding defendant's factual arguments, the prosecution provided both direct and circumstantial evidence that, when viewed in the light most favorable to the prosecution, was sufficient to sustain defendant's conviction. *Wolfe, supra* at 513-514; *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). To sustain a conviction of distribution of child sexually abusive material the prosecution was required to prove that defendant distributed the sexually abusive material and he knew or had reason to know that the image was that of a child. See MCL 750.145c(3). Likewise, to sustain a conviction for possession of child sexually abusive material, the prosecution was required to prove that defendant possessed the child sexually abusive material, and he knew or had reason to know the image was that of a child. See MCL 750.145c(4). Ordinarily, circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

At trial, defendant conceded that the images contained child sexually abusive material. Thus, the question becomes whether the prosecution proved defendant distributed the child sexually abusive material. This did not require that the prosecution disprove every reasonable theory consistent with defendant's innocence, but instead that it introduce evidence sufficient to convince a rational jury of defendant's guilt in the face of defendant's contradictory theory that he was the victim of a "Trojan Horse" virus or unscrupulous employees using his screen name. *Hardiman, supra* at 423-424. "[I]t is simply not the task of an appellate court to adopt inferences that the jury has spurned." *Id*. at 431.

The prosecution established that defendant was the owner of the account responsible for sending the e-mail to the undercover officer and he frequented the chat room from where the e-mail originated. Testimony was also received that defendant received adult pornography and had some files listed as Playboy and Teen Amateur. Defendant later admitted, somewhat ambiguously, that he received and viewed nude images of allegedly underage children. Further,

by a process of exclusion it could be inferred that defendant sent the material to the "Family Fun" chat room members – all other persons with access denied sending the images or having reason to look at the computer disks stored in the back room. Likewise, defendant's knowledge of the presence of the illegal images could be readily inferred from the suggestive names attached to the files and from testimony that all the images found were accessed and all but one retained after their initial download.

In reviewing a sufficiency of the evidence challenge, this Court may not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Hardiman, supra* at 431; *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). Our review of the record indicates that the competing evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow the jurors to conclude that defendant was guilty of distributing and possessing child sexually abusive material. *Harmon, supra* at 529.

Defendant also challenges his sentences arguing that they were disproportionate to the seriousness of the circumstances surrounding the offense and the offender. We disagree.

As a preliminary matter, review of defendant's sentence for distribution of child sexual abusive material is proper under the judicial sentencing guidelines because the offense was committed on October 4, 1998. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). However, the offense of possession of child sexually abusive material, though resulting from a search occurring on February 26, 1999, is a "misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $10,000,00 or both." MCL 750.145c(4). Thus, review is not available because the legislative sentencing guidelines apply only to *felony* offenses committed on or after January 1, 1999. MCL 769.34(1); *Hegwood, supra* at 438. Moreover, the rule established in *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972), does not apply to misdemeanor sentencing; thus, defendant could be properly sentenced to the maximum penalty of one year in prison. MCL 769.28; *People v Lyles*, 76 Mich App 688, 690; 257 NW2d 220 (1977).

Because defendant failed to preserve the issue by including his PSIR along with his brief, review is limited to whether there was plain error that affected defendant's substantial rights. *Carines, supra* at 764-766; *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). To avoid forfeiture under the plain error rule, defendant must establish that: error occurred, the error was clear and obvious, and the plain error affected substantial rights, in that the error affected the outcome of the lower court proceedings. *Carines, supra* at 765. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 763. Here, as outlined earlier, defendant's conviction was supported by sufficient evidence that allowed a rational jury to find that he was guilty beyond a reasonable doubt. Our review of the evidence does not convince us that defendant was actually innocent. Likewise, defendant received a fair trial, mounted a vigorous defense, and was properly convicted; thus he cannot successfully claim there was error that seriously affected the fairness, integrity, or public reputation of the judicial system. *Id.*

In his final appellate issue, raised in propria persona, defendant argues that pursuant to *Ashcroft v Free Speech Coalition*, 535 US 234; 122 S Ct 1389; 152 L Ed 2d 403 (2002), the

prosecution must prove, as a requisite element of the charged offenses, the use of actual children in the depictions of child sexually abusive material. Defendant contends that the prosecution did not prove this element and, consequently, his convictions should be reversed or the matter should be remanded for an evidentiary hearing at which the prosecution may offer proofs that the images in question are in fact images of actual minors engaged in sexual acts.

After the trial in the instant case, the United States Supreme Court in *Ashcroft, supra*, struck down as violative of the First Amendment of the United States Constitution provisions of the federal Child Pornography Protection Act of 1996 (CPPA), which banned not only pornography employing real children in the production process but also "virtual child pornography" that appears to depict minors but is produced by means other than using real children, such as through the use of computer-imaging technology or youthful-looking adults. The *Ashcroft* Court found that the CPPA was overbroad and unconstitutional by prohibiting virtual child pornography.

However, the state statute under which the present defendant was charged limits prosecutions to those in which real children are used in the production process, see MCL 750.145c(1)(i), *supra*, and compelling evidence was introduced that the images portrayed real children in all of the counts of distribution and possession of child sexually abusive material. Thus, defendant's convictions on these counts are not invalid in light of *Ashcroft, supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey